



State AGs and Consumer Protection: An Update and Outlook

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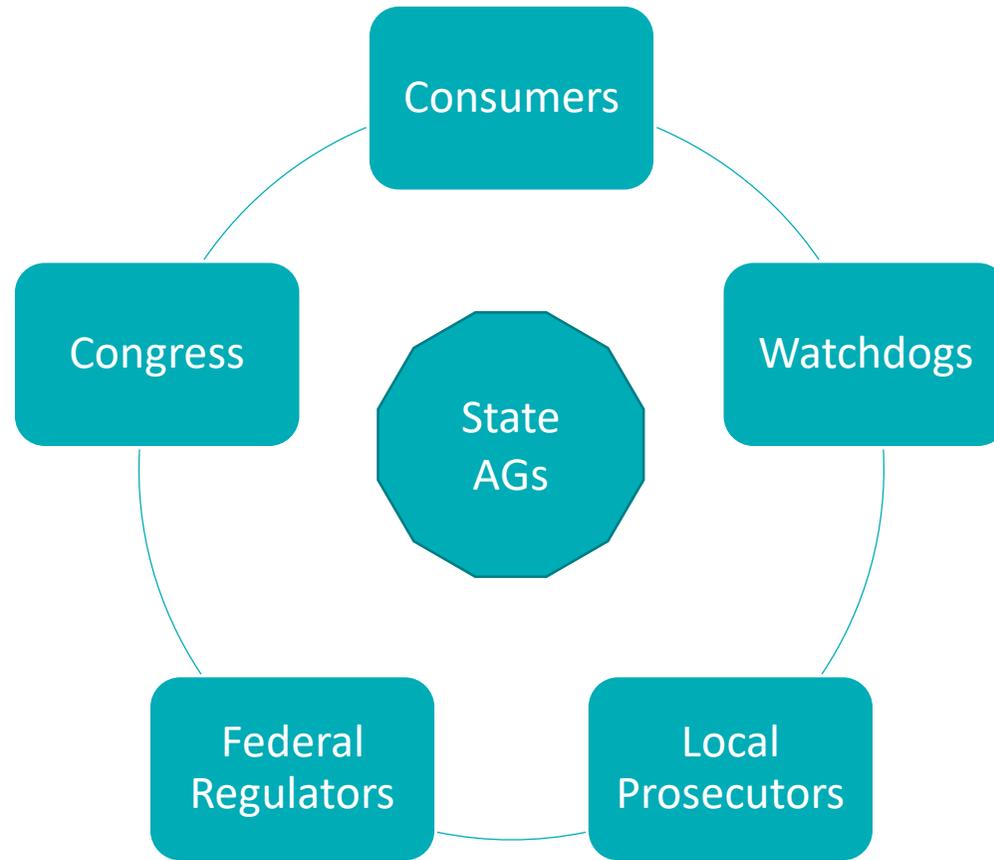
Advertisers: Pay Attention to State AGs

- Broad oversight and investigatory authority over conduct reaching into the state
 - Unfair or deceptive acts and practices (UDAP) laws; generally aligned with FTC Act Sec. 5
 - Industry-specific laws (e.g., telemarketing; charitable solicitations)
- Some states have an expansive legislative consumer protection mandate
 - E.g., UT Stat. § 13-11-4 (deceptive act a violation “whether it occurs before, during, or after the transaction”)
- Ability to seek monetary, injunctive, and declaratory relief in court
 - *Parens patriae* authority

Tools in the State AG Toolbox

- “Informal” information requests
- Formal investigations
 - Civil investigative demand and subpoena authority (documents, testimony)
 - On-staff investigators; secret shops
- Public hearings
- Studies, workshops, reports
- Comments to federal proceedings
- Consumer education
- Mediation

Consumer Protection Oversight



How Do AGs Find You?

- Consumer complaints
 - Directly to AG
 - FTC consumer sentinel
 - BBB and “gripe sites”
- Disgruntled former employees or other insiders
- Competitor complaints
- National and local media coverage
- Referrals from other law enforcers

State AG Case Selection Criteria

- Nature of harm/type of injury
- Deterrent value
- Characteristics of victims
- Severity of violation
- Who is the defendant?
- Likelihood of success/strength of case
- Is relief available through other means?

State AG Priorities

- Healthcare
 - Hospital mergers
 - Opioids and other drugs
- Deceptive Marketing
 - “Meat and potatoes” false advertising
- Antitrust
 - Big tech
- Price Gouging
- Privacy and Data Security
- Charity Fraud
- Countering Hate and Discrimination
- Workers’ Rights

Impact of AMG Case on State AG Offices

- The Supreme Court's opinion in *AMG Capital Management LLC v. Federal Trade Commission* stated that §13(b) of the Federal Trade Commission Act does not give the Federal Trade Commission the power to seek equitable monetary relief, such as disgorgement or restitution.
- State AG offices generally have the power to seek disgorgement, restitution, or civil penalties in their cases.
- The *AMG* case will likely lead to increased partnerships between the FTC and state AG offices.

How Do State AGs Organize?

- **National Association of Attorneys General**
 - Training
 - Conferences
 - Working groups for AGs based upon subject matter
- **Partisan Organizations**
 - Democratic Attorneys General Association
 - Republican Attorneys General Association
- **Attorney General Alliance**

Coordination Among State and Federal Regulators

- At a high level, regulators have shared interests and enforcement goals.
- Multistate Action – Bad actors or harmful practices occurring across states; coordination between state attorneys general.
- Coordinated State/Federal Action – Bad actors or harmful practices occurring nationwide; FTC, CFPB, FCC, CFTC, U.S. DOJ (FBI, Secret Service, TIGTA, HUD, DOL) together with state attorneys general.
- Shared resources and enforcement authority
 - State attorneys general have varying resources, depending on the office and its enforcement authority (criminal vs. civil, bifurcated jurisdiction, special funds).
 - Long (or short) arm of the law – Where is the conduct occurring, and who is best able to reach it and exercise jurisdiction over the actors?

Coordination Among State and Federal Regulators: Considerations

- What does coordination look like?
 - Multistate Action – Multiple jurisdictions (state and/or federal) sharing resources to bring a single action in one jurisdiction.
 - Coordinated Action (industry “sweep”) – Multiple jurisdictions (usually state AGs) sharing resources to bring several contemporaneous actions in different jurisdictions.
 - Generally, only where there is a federal partner will it be possible to commence a multistate action in federal district court. Otherwise, the claims will typically need to be brought in state court.
 - Coordinated actions bring much more pressure, expense, and exposure to a target because they will be required, at least initially, to litigate in multiple forums unless or until an MDL is established.
- Common interest privilege
 - Regulators’ coordinated efforts will almost always be subject to the common interest privilege.
 - Other considerations when dealing with regulators are the investigative and executive deliberation privileges (but these differ by jurisdiction).

Coordination Among State and Federal Regulators: Considerations

- The initial demand
 - Often when a federal partner is involved, there will be a demand requirement before the filing of a lawsuit.
 - This usually involves an opportunity for the target to make a presentation before a commission of the federal regulator.
 - Many state attorney general offices also require some form of demand prior to filing suit.
 - Experienced counsel will assist the target in not squandering this opportunity.

Responding to a State AG Contact

- Type of outreach – dependent
- Litigation holds
- Negotiate scope of subpoena
- Identify areas of concern quickly
- Decipher relief sought
- Meetings with staff
 - When to move up the chain?
- White papers
- Litigation posture
 - ADR may be an option
- Non-legal considerations (e.g., publicity)

Dealing with Multi-State and FTC/State Collaborations

- See previous slide – multiply by 50?
- Focus on the executive committee
- Determine who is driving the agenda
 - Personality-specific
 - Can be state-specific
- Consolidate negotiations to the maximum extent possible
- “Strive for credibility” when dealing with staff

Questions?



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